FILED
FEB 15 1980

IN THE

Supreme Court of the United States

October Term, 1979

Case No. 79-1108

WILLIAM E. JONES, DONALD L. SCHROEDER, CLAYTON RECORD, A. A. McCANDLESS, A. NORTON YOUNGLOVE, PAUL R. WILEY, DIRECTOR, AND THE DEPARTMENT OF PUBLIC SOCIAL SERVICES FOR THE COUNTY OF RIVERSIDE, EDWARD T. HIMENO, M.D.,

Petitioners,

vs

WALTRUENT MARGARETE ROSA MORRISON,

Respondent.

REPLY BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

EDISON P. McDANIELS
Attorney at Law
1566 North "D" Street
San Bernardino, California 92405
Counsel for Respondent

Date: February 15, 1980.

SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	2
The Questions Presented to the U.S. Court of Appeals, Ninth Circuit, in Reference to the Opinion in Favor of Respondent Are As Follows:	2
The Issues Presented By the Petitioners in the Instant Petition Are Phrased As Follows:	4
Statutes and Constitutional Sections Involved	5
Brief Statement of Facts	7
The Petition For Certiorari Should Be Denied Because —	11
Appendix	A-1
A. Order Amending Opinion and Denying Petition For Rehearing	A-1
B. Opinion — U.S. Court of Appeals, Ninth Circuit	A-3
C. Memorandum of Decision, U.S. District Court, Central District of California	A-15

TABLE OF AUTHORITIES CITED

Cases

In Re: Gault, 387 US 1 12
Martinez vs. State of Calif. _____ U.S. _____ 48 L.W. 4076 12
Monell vs Department of Social Services, 436 US 658 ..... 12, 13
Morrison vs Jones, 607 F 2d 1269 (1979) 1, 8, 10, 11, 14
Navarette vs Procunier, 434 U.S. 555 (1978) 12
O'Connor vs Donaldson, 422 U.S. 563 (1975) 12
Scheuer vs Rhodes, 416 U.S. 232 (1974) 12
Truax vs Raich, 239 U.S. 33 15
U.S. vs Shaugnessy, 338 U.S. 543 15

Statutes

California Code of Civil Procedure, Sec. 664.5 7
California Code of Civil Procedure, Sec. 917.7 6
California Code of Civil Procedure, Sec. 1010 6
California Welfare and Institutions Code, Sec. 600(a) 3
United States Code, Title 28, Sec. 1254.1 14
United States Code, Title 28, Sec. 1291 2
United States Code, Title 28, Sec. 1343(3) 2
United States Code, Title 42, Sec. 1981 ..... 1, 2, 3, 4, 5-10
United States Code, Title 42, Sec. 1983 ..... 1, 2, 3-4, 5, 10-11, 13

Constitutions

United States Constitution, Article I, Section 8, Clause 4 3-7
United States Constitution, 14th Amendment 2

Rules

Supreme Court Rule 19.1(b) 14

Appendix

Memorandum Decision of the District Court, Central District of California A-15
Morrison vs Jones 607 F 2d 1269 (1979)
A. Order Amending Opinion and Denying Petition for Rehearing A-1
B. Opinion A-3

IN THE

Supreme Court of the United States

October Term, 1979

Case No. 79-1108

WILLIAM E. JONES, DONALD L. SCHROEDER, CLAYTON RECORD, A. A. McCANDLESS, A. NORTON YOUNGLOVE, PAUL R. WILEY, DIRECTOR, AND THE DEPARTMENT OF PUBLIC SOCIAL SERVICES FOR THE COUNTY OF RIVERSIDE, EDWARD T. HIMENO, M.D.,

Petitioners,

vs.

WALTRUENT MARGARETE ROSA MORRISON,

Respondent.

I
OPINIONS BELOW

The judgment sought to be reversed by Petitioners is a judgment issued by the United States Court of Appeals, Ninth Circuit, affirming in part and reversing in part a Summary Judgment of the United States District Court, Central District of California, on the grounds that the complaint by Respondent herein stated a Cause of Action in favor of Respondent herein for violations of her Civil Rights pursuant to the Civil Rights Act, Title 42, United States Code, Sections 1981, 1983. The judgment was rendered October 19, 1979, and the Petition for rehearing was denied on November 26, 1979.

The judgment is reported in 607 Fed. 2d 1269 (1979) and is appended here as Appendix A. The Memorandum Decision of the District Court is appended here as Appendix B.

II
JURISDICTION

Respondent claimed jurisdiction in the District Court, Central District of California pursuant to Title 28 United States Code Section 1343 (3), Title 42 United States Code Section 1983, Title 42 United States Code Section 1981, and the 14th Amendment of the United States Constitution.

Respondent claimed jurisdiction in the United States Court of Appeal, Ninth Circuit, based upon the jurisdiction of the Court of Appeal by virtue of a final decision pursuant to Title 28 United States Code Section 1291.

III
THE QUESTIONS PRESENTED TO THE UNITED STATES COURT OF APPEALS — NINTH CIRCUIT IN REFERENCE TO THE OPINION IN FAVOR OF RESPONDENT ARE AS FOLLOWS:

1. Where Plaintiff has brought an action to recover custody of her minor child in state courts; and, after a hearing and before the expiration of state statutory time to appeal had expired, without notice to counsel or to Appellant, County authorities removed the minor child to Germany in order to defeat Plaintiff's appellate rights, does such a Plaintiff, as mother of the minor, have standing to bring an action for violation of her civil rights under Section 1983, Title 42, United States

Codes, where said minor was lawfully in the United States in the first place.

2. Where Plaintiff's minor child is an alien lawfully in the United States of America; and County authorities had taken said minor from the parent on the basis of the minor being mentally ill; and, the mother is maintaining an action to recover said minor, may County authorities, without notice to the parent, and without obtaining permission or a hearing before the United States Immigration Authorities, and no deportation proceeding is pending against said minor, return said minor to Germany and thereafter claim official immunity from liability under 42 United States Code Sections 1981 and 1983 based upon various theories of governmental immunity.

3. Where the Director of the Department of Public Social Services transported a minor child overseas to a foreign jurisdiction without benefit of a final judgment, and before the expiration of statutory time to appeal, without notice, without complying with state statutes, or going through the Department of Immigration and Naturalization Services of the United States, can such a Director, sued individually, escape liability under 42 United States Codes 1983 on the basis of governmental immunity?

4. Placement of a minor child pursuant to provisions of Section 600a of the California Welfare and Institutions Code cannot be done in violation of the Fourteenth Amendment of the United States or of Article I, Section 8, Clause 4 of the Constitution of the United States.

5. Exhaustion of state remedies is not a prerequisite to filing suit under Section 1983, Title 42, United States Codes.

THE ISSUES PRESENTED BY THE PETITIONERS IN THE INSTANT PETITION ARE PHRASED AS FOLLOWS:

1. Whether individual members of a County Board of Supervisors are absolutely immune from liability in a suit under 42 United States Code Sections 1981 and 1983, when acting within the scope of their legislative capacities and pursuant to valid court order.

2. Whether the director of a local governmental agency; i.e., a public official, is absolutely immune from liability in a suit under 42 United States Codes Sections 1981 and 1983, when acting pursuant to a valid state court order in conducting the business of a public agency.

3. Whether a local governmental agency is absolutely immune from liability in a suit under 42 United States Codes Sections 1981 and 1983 and whether such agency can be held liable under a respondeat superior theory.

4. Whether a physician is absolutely immune from liability in a suit under 42 United States Codes Sections 1981 and 1983, when acting in a discretionary capacity within the course and scope of his employment by a public entity and pursuant to a valid state court order.

5. Whether a matter concerning child custody and placement is actionable under 42 United States Codes Section 1981 or 1983 or is within the exclusive purview in jurisdiction of the state court.

6. Whether damages alleging emotional distress only are sufficient to support a claim under 42 United States Codes Sections 1981 and 1983.

The issues present by Petitioners in their Petition before this Court for a Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit are not supported by the facts and evidence in this action.

IV
STATUTES AND CONSTITUTIONAL SECTIONS INVOLVED

1. Civil Rights; Title 42, Section 1981, Equal Rights Under the Law.

> "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

2. Civil Rights; civil action for deprivation of rights Title 42, Section 1983.

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, sued in equity, or other proper proceeding for redress."

3. *California Code of Civil Procedure, Section 1010 "Notices; writing; contents; supporting papers; service; defaulting party.*

Notices must be in writing, and the notice of a motion, other than for a new trial, must state when, and the grounds upon which it will be made, and the papers, if any, on which it is to be based. If any such paper has not previously been served upon the party to be notified and was not filed by him, a copy of such paper must accompany the notice. Notices and other papers may be served upon the party or attorney in the manner prescribed in this chapter, when not otherwise provided by this code. No bill of exceptions, notice of appeal, or other notice or paper, other than amendments to the pleadings, or amended pleading, need be served upon a party whose default has been duly entered or who has not appeared in the action or proceeding." (Enacted 1872 as amended Statutes 1907, Chapter 327, Page 601, Section 1; Statutes 1935, Chapter 722, Page 1966, Section 28.)

4. *California Code of Civil Procedure Section 917.7.*

". .in the absence of a writ of order of a reviewing court providing otherwise, the provisions of such judgment or order allowing, or eliminating restrictions against, removal of the minor child from the state are stayed by operation of law for a period of 30 days from the entry of judgment or order and/or subject to any further stays ordered by the trial court."

5. *The Constitution of the United States, Article I, Section 8, Clause 4. In part*

"The Congress shall have power. . .to establish uniform rules of naturalization."

6. *California Code of Civil Procedure, Section 664.5*

"Promptly upon entry of judgment in a contested action or special proceeding in a superior or municipal court, the clerk of the court shall mail notice of entry of judgment to all parties who have appeared in the action or special proceeding and shall execute a certificate of such mailing and place it in the Court's file in the cause. For purposes of this section, 'judgment' includes any judgment, decree, or signed order from which an appeal lies. Upon order of the court in any action or special proceeding, the clerk shall mail notice of entry of any judgment or ruling, whether or not appealable."

V
BRIEF STATEMENT OF FACTS

Respondent Morrison is a German alien married to an American citizen. Her natural son Michael is also a German alien. On July 16, 1970 when Michael was eight years old, he was sent by his Grandparents, with whom he was living, to reside with his mother. From that time until his return to Germany, Michael was a lawful resident of the United States. When Michael arrived in the United States, he was ill. He "didn't play, sat for hours, paced in a square, weighed 38 pounds and was not taught to dress himself."

On November 11, 1972, Morrison had Michael admitted to the Childrens Psychiatric Unit at Riverside

County General Hospital, hereinafter called, "hospital", where the child was diagnosed as suffering from childhood schizophrenia with severe nutritional and emotional deprivation. On several occasions, Respondent attempted unsuccessfully to remove Michael from the care of the hospital.

In December of 1972, the hospital caused a petition to be filed in the California Superior Court, Riverside County, Juvenile Department, alleging that Michael was in need of proper care and control and that he had no parent capable of providing care and control. Respondent herein was not satisfied with the care that Michael was receiving at the hospital and commenced actions to have Michael returned to her.

She eventually brought a contested action to recover the minor from the Juvenile Court.

During the course of successive review hearings, commencing on July 13, 1973, the antagonism between Morrison, (Respondent herein) and David W. Swann, a social worker for the Department of Public Social Services became evident. (*See Morrison vs Jones* 607 F 2d 1269 [1979] Page 1271.)

At each of these review proceedings Michael was continued as a ward of the court and his placement remained as a ward at the hospital. Michael was briefly returned to his mother but upon the report that Michael's physical condition had deteriorated, Michael was removed from his mother's home on November 8, 1974. At a hearing shortly after Michael's return to the hospital, Mr. Swann reported to the court that the hospital staff was "recommending that Michael be returned to the home of his Grandparents in Germany. He is apparently still a German citizen, his Grandparents are

anxious to have him returned to them and they appear to be capable of arranging to meet his needs. Mrs. Morrison has indicated that she wants to have Michael returned to her home, but she would rather have him return to his Grandparents than remain in the hospital." In the Juvenile Court's Order recommitting Michael to the hospital, the Court included, as an alternative to the placement in the hospital, residence with Michael's Grandparents in Germany. No notice was given to Respondent.

On March 25, 1975, the Director of Public Social Services requested the County Board of Supervisors for Riverside County to approve funds to transport Michael, accompanied by an adult, to Germany. The Board approved the travel request and continued the fund transfer portion of the request until April 1, 1975 at which time the transfer of the necessary funds for transportation of the dependent child, and an adult companion was authorized by the Board. No notice of either of these actions was given to Morrison by the Board. (*See Morrison vs Jones* 607 F 2d 1269 [1979] at Page 1272.) Respondent herein first learned that County officials were going to transport her child to Germany when she read a newspaper story in the Riverside Daily Enterprise, dateline of March 27, 1975 entitled "Youngster's Illness To Bring First Paid Trip Abroad By County Employee."

Respondent then obtained a Writ of Prohibition in which an alternative writ was granted on April 3 directing Mr. Wiley (the Director of the Department of Public Social Services) to "desist and refrain from any further proceedings in the said action until further order of this Court thereon. . ."

A hearing date was set for consideration of Respondents Morrison's request for modification of the December 27, 1974 dependency order. The cause was set for a contested hearing on May 1, 1975. The Court also ordered a stay of the prior Court order permitting Michael's placement in Germany, until completion of the hearings scheduled for May 1, 1975 and until further order of the Court. Because the prior Petition for a Writ of Prohibition thereby became moot the Petition for Writ was dismissed. *(See Morrison vs Jones* 607 F 2d 1269, 1272.)

The contested hearing was held on May 1, 1975, before Judge Gerald F. Schulte, Juvenile Court Judge. On May 5, 1975, Judge Schulte denied Respondent's Motion for Termination of Dependency and For Physical Custody of Michael. Neither Morrison (Respondent herein) nor her lawyer was given any notice of the May 5, 1975 order. On May 9, 1975, Michael was transported to Germany.

Morrison, Respondent herein, first learned that Michael had been sent to Germany when she received a note signed by Mr. Swann of the Department of Public Social Services which, in its entirety, states:

"This letter is to notify you that on Friday, May 9, 1975, Michael left the hospital to return to his Grandparents' home in Germany."

Respondent herein filed a timely notice of appeal from the order of May 5, 1975. The appeal was later voluntarily dismissed. *Morrison vs Jones* 607 F 2d 1269, Page 1273.

Respondent then filed a Civil Rights Action pursuant to Civil Rights Acts 42 U.S.C. Sections 1981, 1983 against the Board of Supervisors of the County of Riv-

erside and all of the Petitioners that are named here.

The United States District Court, Central District of California had filed a Memorandum of Decision on September 30, 1976 which is appended herein which dismissed or granted a Motion for Summary Judgment in favor of all Defendants.

The Memorandum of Decision states that public entities are immune from liability for injuries pursuant to California Government Codes.

The Defendants in that action reasserted their claims to immunities before the Ninth Circuit Court of Appeal and in addition they argue that Morrison had no standing to maintain the action and that she had failed to exhaust her state remedies and that exclusive jurisdiction resided in the State Court system and that her amended complaint stated no claim for relief. The Ninth Circuit Court of Appeal affirmed the District Court's Grant of Summary Judgment in favor of Byron C. Morton, District Attorney, and Donald D. Sullivan, Clerk of the Superior Court, and held that both of them under the circumstances of this case are protected by absolute quasi judicial immunity. However, they reversed Summary Judgment in favor of the remaining Defendants. *(See Morrison vs Jones* 607 F 2d 1269.)

VI
THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE —

1. Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. 1983 or 1985 (3) cannot be immunized by state law. A construction of the Federal Statutes which permitted a state immunity defense to have controlling effect would transmute a basic

guarantee into an illusory promise; and the supremacy clause of the Constitution insures that a proper construction may be enforced. *See McLaughlin vs Tilendis*, 398 F 2d 287, 290 (7th Cir.). The immunity claim raises a question of Federal Law. *Hampton vs City of Chicago*, Cook County, Ill., 484 F 2d 602, 607 (C.A. 7, 1973), Cert. Denied, 415 U.S. 917. *(George Martinez vs State of California* #78-1268, Decided Jan. 15, 1980, _____ U.S. _____, 48 L.W. 4076. Ft. Note #8.

2. There is no showing whatever that the decision of the Ninth Circuit conflicts in any way with the Supreme Court's previous holding in *Scheuer vs Rhodes*, 416 US 232 (1974); *Navarette vs Procunier*, 434 US 555 (1978); *Wood vs. Strickland*, 420 US 308, 1975 and *O'Connor vs Donaldson*, 422 US 563, 1975, or *Monell vs Department of Social Services*, 436 US 658.

Petitioners are requesting this Court to declare that simply by a naked assertation of being clothed with color of law they are immune to lawsuits, regardless of whether their acts violate State or Federal law. Petitioners herein are requesting this Court to void its previous holdings in *Scheuer vs. Rhodes*, 416 US 232; *Navarette vs Procunier*, 434 US 555; *Wood vs Strickland*, 420 US 308; *O'Connor vs Donaldson*, 422 US 563, and *Monell vs Department of Social Services*, 436 US 658.

Petitioners have not shown in their petition how their violation of due process of the Respondent herein which resulted in an unlawful and illegal deportation squares with this Court's holding *In Re Gault*, 387 US 1, especially where notice was given after the minor had been flown to Germany.

3. Petitioners statements in their Brief at Page 11 that

> "The decision below conflicts with decisions holding public officials and employees absolutely immune from liability under Federal Civil Rights Statutes"

flies squarely in the face of the holding of *Monell vs Department of Social Services of the City of New York* 98 SC 218 (1978) at Page 2035 where the Court states:

> "Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress did intend municipalities and other local governmental units to be included among those persons to whom Section 1983 applies. Local governing bodies, therefore, can be sued directly under Section 1983 for monetary, declaratory, where injunctive relief, where as here, the action that is alleged to be unconstitutional implements or execute a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the Section 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other Section 1983 'person' by the very terms of the Statute, may be sued for Constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not yet received formal approval through the body's official decision-making channel" *(Monnell vs Department of Social Services*

of the City of New York 98 SC 218 [1978] Page 2035, 2036).

4. It does not appear that Petitioners have complied with Supreme Court Rule 19.1(b) and that they have failed to point out in what manner the decision is in conflict with other Courts of Appeal on this same matter. On the contrary, the decision on the Ninth Circuit Court of Appeal is squarely in point and follows specifically the prior holdings of this Court as to the requirement of good faith.

5. It does not appear that the Supreme Court at this time pursuant to 28 U.S.C. 1254.1 have jurisdiction to entertain a Writ of Certiorari in this Court as the matter is not final. There is no judgment from the District Court as the judgment for the Ninth Circuit Court of Appeals was in the nature of a remand back to the District Court for further proceeding consistent with the views expressed in the Opinion.

See Morrison vs. Jones 607 F 2d 1269 at Page 1276.

6. This is not a case of Respondent superior. This is a case where there was a conspiracy that was participated in by all of the Petitioners, as an ongoing policy by the highest officials of the County of Riverside, acting wholly under color of law in their official positions, conduct that was totally illegal and void, and without due process of law.

We respectfully urge the Court that Petitioner's actions are outside the scope of their official duties and authority; nevertheless they used that authority to totally deny due process of law, and contravened the Constitution of the United States in doing so.

No immunity should lie for such massive transgressions of the civil rights of others.

The authority to control immigration — to admit or exclude aliens — is vested solely in the Federal Government. *Truax vs Raich,* 239 U.S. 33; admission of Aliens to the United States is a privilege granted by the sovereign United States Government (*U.S. vs. Shaugnessy,* 338 U.S. 543), the exclusion of Aliens is a fundamental act of sovereignty (*U.S. vs Shaugnessy,* 338 U.S. 543).

Neither the County of Riverside, nor any of its elected officials have been delegated any powers to exercise rights of the sovereign as they did in this case.

The mandate of the Court of Appeals was ordered filed and spread upon the minutes of the United States District Court, Central District of California on Wednesday, December 12, 1979 and there has been no judgment issued by that Court on the proceedings concerning the filing of the Complaint and we would urge the Court at this point to deny the Petition for a Writ of Certiorari for the reasons heretofore stated in this Reply Brief.

Dated February 15, 1980.

Edison P. McDaniels
Attorney for Respondent

APPENDIX

IN THE

United States Court of Appeals for the Ninth Circuit

Case No. 77-1066

WALTRUENT MARGARETE ROSA MORRISON,

Respondent-Plaintiff-Appellant,

vs.

WILLIAM E. JONES, DONALD L. SCHROEDER, CLAYTON RECORD, A. A. YOUNGLOVE,** BYRON C. MORTON, DISTRICT ATTORNEY FOR THE COUNTY OF RIVERSIDE, PAUL R. WILEY, DIRECTOR, AND THE DEPARTMENT OF PUBLIC SOCIAL SERVICES FOR THE COUNTY OF RIVERSIDE, DONALD D. SULLIVAN, CLERK OF THE SUPERIOR COURT FOR THE COUNTY OF RIVERSIDE, EDWARD T. HIMENO, M.D.,

Petitioner-Defendants-Appellees.

ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING

Before: BRIGHT,* HUFSTEDLER and ANDERSON, Circuit Judges.

**The name of the board member as stated above is incorrect and should read as A. A. McCANDLESS, A. NORTON YOUNGLOVE,...

*The Honorable Myron H. Bright, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

The Per Curiam opinion filed October 19, 1979, is amended as follows:

At the end of the first paragraph in the right-hand column of the slip opinion, at page 312, and immediately before the paragraph designated as headnote "[7]" the following paragraph is inserted:

> "Dr. Himeno was the Director of Child Psychiatry of the In-Patient Unit at Riverside County General Hospital. The court below found that Morrison had failed to make sufficient allegations that Doctor Himeno had caused any injury or participated in the conspiracy. However, the Complaint alleges that Doctor Himeno recommended to the Board that Morrison's son be sent to Germany since he was taking up valuable bed space. All that Dr. Himeno's affidavit states is that at all times material to the present cause of action, he acted within the scope of his duties as a director of the county hospital. In the absence of any other evidence, we believe that the allegations in the Complaint sufficiently averred participation by Dr. Himeno in the conspiracy to deprive Morrison of her son. Thus, we find that the summary judgment entered as to Dr. Himeno was inappropriate on this state of the record."

As so amended, the petition for rehearing of defendants-appellees is DENIED.

United States Court of Appeals for the Ninth Circuit

Case No. 77-1066

WALTRUENT MARGARETE ROSA MORRISON,

Plaintiff-Appellant.

v.

WILLIAM E. JONES, DONALD L. SCHROEDER, CLAYTON RECORD, A. A. YOUNGLOVE,** BYRON C. MORTON, DISTRICT ATTORNEY FOR THE COUNTY OF RIVERSIDE, PAUL R. WILEY, DIRECTOR, AND THE DEPARTMENT OF PUBLIC SOCIAL SERVICES FOR THE COUNTY OF RIVERSIDE, DONALD D. SULLIVAN, CLERK OF THE SUPERIOR COURT FOR THE COUNTY OF RIVERSIDE, EDWARD T. HIMENO, M.D.,

Defendants-Appellees.

OPINION

Appeal from the United States District Court for the Central District of California

Before: BRIGHT,* HUFSTEDLER, and ANDERSON Circuit Judges

PER CURIAM:

Morrison brought this civil rights action (42 U.S.C. §§ 1981, 1983) against the Board of Supervisors of the

---

**The name of the board member as stated above is incorrect and should read as A. A. McCANDLESS, A. NORTON YOUNGLOVE,...

*Honorable Myron H. Bright, United States Circuit Judge, Eighth Circuit, sitting by designation.

County of Riverside ("Board") and other named county officials who caused her minor son, Michael, a dependent ward of the Juvenile Court, to be transported to Germany, in violation of her constitutional rights. The district court granted summary judgment in favor of the defendants on the ground that each of the defendants was immune from liability. The defendants reassert their claims to immunity, and they argue, in addition, that Morrison had no standing to maintain the action, that she failed to exhaust her state remedies, that exclusive jurisdiction resided in the state court system, and that her amended complaint stated no claim for relief. We affirm the district court's grant of summary judgment in favor of Byron C. Morton, District Attorney, and Donald D. Sullivan, Clerk of the Superior Court, because both of them, under the circumstances of this case, are protected by absolute quasi-judicial immunity. We reverse summary judgment in favor of the remaining defendants.

Morrison is a German alien married to an American citizen. Her natural son, Michael, is also a German alien. On July 16, 1970, when Michael was eight years old, he was sent by his grandparents, with whom he was living, to reside with his mother. From that time until his return to Germany, Michael was a lawful resident of the United States. According to Morrison, Michael was ill when he arrived. He "didn't play, sat for hours, paced in a square, weighed 38 pounds; . . . and was not taught to dress himself. . . ."

On November 11, 1972, Morrison had Michael admitted to the Children's Psychiatric Unit at Riverside General Hospital ("Hospital"), where the child was diagnosed as suffering from childhood schizophrenia

with severe nutritional and emotional deprivation. On several occasions after his commitment, Morrison tried unsuccessfully to remove Michael from the care of the Hospital.

In December, 1972, the Hospital caused a petition to be filed in the California Superior Court, Riverside County, Juvenile Department, alleging that Michael was in need of proper care and control and that he had no parent capable of providing care and control. The record before us does not indicate the grounds supporting the dependency petition. On January 12, 1973, after notice to Morrison and a hearing, Michael was adjudged a dependent child of the court pursuant to section 600(a) of the California Welfare and Institutions Code. Michael was placed by a court order at the Children's Psychiatric Unit of the Hospital.

Morrison continued her efforts to recover custody of the child and to remove him from the Hospital. During the course of successive review hearings, commencing on July 13, 1973, the antagonism between Morrison and David W. Swan, a social worker for the Department of Public Social Services, became evident.[1] In each of

[1]For example, Mr. Swan's report, presented at the review hearing on July 13, 1973, said: "If Mr. and Mrs. Morrison continue to exhibit an uncooperative attitude toward the hospital, the hospital staff will probably recommend that Michael should not return to their home when he leaves the hospital."

Again, in the review hearing set for January 11, 1974, Mr. Swan reported the Morrisons' "lack of cooperation." He wrote: "For several months after Michael's placement at Riverside General Hospital, Mrs. Morrison was upset about his placement and did not cooperate with the treatment planned for him. At the present time, she and her husband are cooperating with the program although she is still anxious to have Michael return to her home and she exhibits a fear of signing any forms that pertain to Michael unless she is positive that she understands them. . . [S]he said that the last time she signed a form at Riverside General Hospital, Michael was removed from her home."

these review proceedings, Michael was continued as a ward of the court and his placement remained at the Hospital.

Michael was briefly returned to his mother, but upon the report that Michael's physical condition had deteriorated, Michael was removed from his mother's home on November 8, 1974. At a hearing shortly after Michael's return to the Hospital, Mr. Swan reported to the court that the hospital staff was "recommending that Michael be returned to the home of his grandparents in Germany. He is apparently still a German citizen, his grandparents are anxious to have him returned to them and they appear to be capable of arranging to meet his needs. Mrs. Morrison has indicated that she wants to have Michael returned to her home, but she would rather have him returned to his grandparents than remain in the hospital." In the Juvenile Court's order recommitting Michael to the Hospital, the court included, as an alternative to placement in the Hospital, residence with Michael's grandparents in Germany.[2]

On March 25, 1975, the Director of Public Social Services requested the County Board of Supervisors for Riverside County to approve funds to transport Michael, accompanied by an adult, to Germany. The Board approved the travel request and continued the fund transfer portion of the request until April 1, 1975, at which time the transfer of the necessary funds for transportation of the dependent child, and an adult companion, was authorized by the Board. No notice of

[2]The notation of potential placement of Michael with his grandparents in Germany was made by handwriting. Morrison has averred that this modification of the dependency order was not communicated to her at any time. The record contains no evidence that the minute order was served on her.

either of these actions was ever given to Morrison by the Board.

According to Morrison, she first learned that county officials were going to transport her child to Germany when she read a newspaper story in the Riverside Daily Enterprise, dateline March 27, 1975, entitled "Youngster's Illness to Bring First Paid Trip Abroad by County Employe [sic]."[3]

After she read the newspaper article, Morrison for the first time obtained a lawyer, who filed on her behalf a writ of prohibition with the Superior Court of the County of Riverside to prevent Michael's deportation. The alternative writ was granted on April 3, 1975, directing Mr. Wiley to "desist and refrain from any further proceedings in the said action. . . until further order of this court thereon. . . ." A hearing date was set for consideration of Morrison's request for modification of the December 27, 1974, dependency order. The cause was set for a contested hearing on May 1, 1975. The court also ordered a stay of the prior court order, permitting Michael's placement in Germany, until completion of the hearing scheduled for May 1, 1975, and until further order of the court. Because the prior petition for a writ of prohibition thereby became moot, the petition for the writ was dismissed.

[3]The news story quoted Paul R. Wiley, Director of Public Social Services, as advising the Supervisors that "the child's care costs $169 a day —more than $60,000 a year," but "[t]he cost of the one-way trip for the boy and a round trip for Allen [his therapist] will be about $1,500." The story also quoted Dr. Himeno, Director of the Children's Psychiatric Unit at Riverside General Hospital, as describing Michael as "very disturbed" and "extremely taxing for anyone to cope with." The same article stated, "Himeno urged his early return to Germany 'because he is taking valuable bed space on the unit and we do have patients waiting to be admitted once he is discharged.'"

The contested hearing was held on May 1, 1975, before Judge Gerald F. Schulte, juvenile court judge. On May 5, 1975, Judge Schulte denied Morrison's motion for termination of dependency and for physical custody of Michael. Neither Morrison nor her lawyer was given any notice of the May 5, 1975, order. On May 9, 1975, Michael was transported to Germany. Morrison first learned that Michael has been sent to Germany when she received a note signed by Mr. Swan of the Department of Public Social Services which, in its entirety, states: "This letter is to notify you that on Friday, May 9, 1975, Michael left the hospital to return to his grandparents' home in Germany."

Morrison filed a timely notice of appeal from the order of May 5, 1975. The appeal was later voluntarily dismissed.

Morrison filed this action in the district court on August 21, 1975, and she filed an amended complaint on November 16, 1975. The name defendants are William E. Jones, Donald L. Schroeder, Clayton Record, A. A. McCandless, and A. Norton Younglove, all members of the Board; Paul R. Wiley, Director, Department of Public Social Services for the County of Riverside; Byron C. Morton, District Attorney for the County of Riverside; Donald D. Sullivan, Clerk of the Superior Court for the County of Riverside; Department of Public Social Services for the County of Riverside; and Edward T. Himeno, M.D., Director of Child Psychiatry of the In-Patient Unit, Riverside General Hospital.

I

The district court correctly granted summary judgment in favor of the District Attorney, Byron C.

Morton, and the Clerk of the Superior Court, Donald D. Sullivan. The record reveals that Morton's only participation in the events of which Morrison complains was the presentation of evidence at the contested hearing on May 1, 1975. He is clothed with absolute quasi-judicial immunity because his "challenged activities [were] an 'integral part of the judicial process.'" *Imbler v. Pachman*, 424 U.S. 409 (1976).

No averments of the amended complaint, supported by any evidence in opposition to the motion for summary judgment, charged Donald D. Sullivan, Clerk of the Superior Court, with any act or omission that caused injury to Morrison. At best, she has charged him with some kind of responsibility for her failure to receive notice of the May 5, 1975, order. His failure, if any, to perform a ministerial duty which was a part of judicial process is also clothed with quasi-judicial immunity. *Cf. Denman v. Leedy*, 479 F.2d 1097 (6th Cir. 1973); *Smith v. Rosenbaum*, 460 F.2d 1019 (3d Cir. 1972). *See also Schuman v. State of California*, 584 F.2d 868 (9th Cir. 1978); *Gillibau v. City of Richmond*, 417 F.2d 426, 429 n.4 (9th Cir. 1969). *Cf. Stewart v. Minnick*, 409 F.2d 826 (9th Cir. 1969).[4]

We cannot sustain the district court's holding that the remaining defendants were immune.

When the district court ruled that the Department of Social Services for the County of Riverside was immune from civil rights liability, the district court did not have the benefit of *Monell v. Department of Social Services*, 436 U.S. 658 (1978). The Supreme Court held that local governmental bodies were not wholly immune from

---

[4]Judge Gerald F. Schulte, initially named as a defendant, was absolutely immune. *Stump v. Sparkman*, 435 U.S. 349 (1978). Morrison has not appealed from the judgment dismissing him from the action.

section 1983 liability. The Court also observed that state law immunities, upon which the district court relied, cannot override a section 1983 cause of action. *See also Donovan v. Reinbold,* 433 F.2d 738 (9th Cir. 1970).

The members of the Board were not absolutely immunized from liability. The state statutory immunity afforded by California Government Code § 820.2 is inapplicable. *Monell v. Department of Social Services, supra,* 436 U.S. 658. The Board's reliance upon our holding in *Hoffman v. Halden,* 268 F.2d 280 (9th Cir. 1959) is misplaced. *Hoffman* has been overruled by a long line of Supreme Court cases beginning with *Scheuer v. Rhodes,* 416 U.S. 232 (1974). *E.g., Navarette v. Procunier,* 434 U.S. 555 (1978); *Wood v. Strickland,* 420 U.S. 308 (1975); *O'Connor v. Donaldson,* 422 U.S. 563 (1975).

As an alternative ground for supporting the summary judgment, the Board members suggest that they are entitled to the absolute legislative immunity of *Tenney v. Brandhove,* 341 U.S. 367 (1951). The Supreme Court has never decided whether individuals performing legislative functions on the purely local level should be afforded this type of absolute immunity, or whether they are entitled only to the qualified immunity allowed executive officials. *Lake Country Estates v. Tahoe Regional Planning Agency,* 99 U.S. 774, 59 L.ed. 2d 401, 412 n.26 (1979). We do not have occasion on the record before us to reach the issue because the record is too poorly developed to permit us to decide whether any or all of the acts attributed to the members of the Board were done in a legislative capacity.

On the fragmentary record before us, the members of the Board can claim no more than the qualified immunity afforded to executive officers upon standards

laid down by the Supreme Court in *Scheuer v. Rhodes, supra,* and its spawn. The record is entirely inadequate to establish the subjective and objective elements of the good faith standard established by the Supreme Court. *Wood v. Strickland, supra,* 420 U.S. at 313-14, 321-22. *See also Navarette v. Procunier, supra,* 434 U.S. at 561-62; *Thomas v. Younglove,* 545 F.2d 1171, 1172-73 (9th Cir. 1976); *Lokey v. Richardson,* _____ F.2d _____ (9th Cir. 1979) [slip op'n July 11, 1979, at 2515].

Paul R. Wiley, Director of the Department of Social Services, is an executive officer, and he can only avail himself of the qualified immunity of *Scheuer v. Rhodes, supra.* Himeno, Director of Child Psychiatry of the In-Patient Unit at the Hospital, enjoys no greater immunity than Wiley. *O'Connor v. Donaldson, supra,* 422 U.S. 563.

Each of these defendants suggests that he was immunized from liability because he was relying upon the court order dated May 5, 1975. The record, in its present state, does not support the contention. None of the defendants was ordered to transport Michael to Germany. None of the defendants, with the possible exception of Wiley, was authorized to change Michael's custody. In pertinent part, the minute order provided: "That the minor continue under the care, custody and control of Paul Wiley, Director of the Department of Public Social Services," and "[t]hat the existing commitment to the Children's Psychiatric Unit at the Riverside General Hospital remain in effect; except that as an alternate placement the minor may be placed by the director with the minor's grandparents in Germany." Furthermore, with some support in the record, Morrison avers that the May 5 order was effectively stayed by the earlier order of the court granting a stay "until

further order of the court." The May 5 order said nothing about the prior stay. In addition, California Code of Civil Procedure § 917.7 provides an automatic stay by operation of law for 30 days from the entry of a judgment or order of the Juvenile Court "allowing or eliminating restrictions against removal of the minor child from the state."[5]

II

None of the procedural arguments advanced by the defendants to uphold the summary judgment have merit.

The contention that Morrison does not have standing to sue because she is merely asserting the rights of her child is frivolous. Morrison is not attempting to assert Michael's rights not to be transported to Germany. Rather, she is asserting her interest as the mother of the child to preserve her access to the child and her access to effective judicial relief, which, she alleges, the defendants' conduct destroyed. The defendants' alleged actions unquestionably caused injury to Morrison with respect to her relationships with her son. Those interests, based on familial concepts, recognized by custom and practice for generations, are protected under the Constitution. *E.g., Stanley v. Illinois,* 405 U.S. 645 (1972) (constitutionally protected interests of parent in custody of his or her child); *In re Gault,* 387 U.S. 1 (1967) (right of parents to receive notice of state juvenile delinquency proceedings against their child). Morrison's injury in fact to her recognized legal interests is enough to grant her standing. *E.g., Data Processing Service v. Camp,* 397 U.S. 150 (1970).

The contention that Morrison's action was defeated because she failed to exhaust her state remedies is also legally frivolous. She was not required to exhaust her judicial or administrative remedies before she brought her civil rights action. *McNeese v. Board of Education,* 373 U.S. 668 (1963); *Monroe v. Pape,* 365 U.S. 167 (1961); *Lane v. Wilson,* 307 U.S. 268 (1939); *Home Telephone & Telegraph Co. v. City of Los Angeles,* 227 U.S. 278 (1913); *Whitner v. Davis,* 410 F.2d 24 (9th Cir. 1969).[6]

Equally unavailing is defendants' contention that the exclusive jurisdiction of Morrison's action lies in the state courts of California. Morrison is asserting federal rights secured by both the federal Constitution and federal statutes, and she is not relegated to the state court system to vindicate any of those claimed federal rights.

III

Finally, the defendants argue that Morrison's amended complaint stated no claim against any of them upon which relief could be granted. Morrison's amended complaint was inartfully drafted, but we are required to construe complaints under the Civil Rights Act liberally.

---

[5] Because the May 5 order did not order removal of the child from the state and his transportation to Germany, we do not have occasion to decide whether an order that purported to transport the child out of the United States would have been valid.

Nothing in Welfare and Institutions Code §§ 368 and 738 authorizes a Juvenile Court to transport Michael to Germany because Michael, at the time of the order, was a resident of California, his mother was a California resident, and Wiley, in whose custody Michael was placed, was also a California resident.

[6] The defendants' argument that Morrison has remedies to exhaust is particularly ironic because, according to the averments of the complaint, the defendants' own actions placed Michael beyond the reach of any process that either the state or the federal courts could issue, and, of course, the child's German grandparents were never subject to the processes of the courts of the United States.

Thomas v. Younglove, supra, 545 F.2d 1171; *Marshall v. Sawyer,* 301 F.2d 639 (9th Cir. 1962). As we pointed out in *Marshall v. Sawyer,* the "only elements which need to be present in order to establish a claim for damages under the Civil Rights Act are that the conduct complained of was engaged in under color of state law, and that such conduct subjected the plaintiff to the deprivation of rights, privileges, or immunities secured by the Constitution of the United States." *Id.* at 646.

It is undisputed that each of the defendants acted under color of state law. At this preliminary stage of the proceedings, we cannot say that she has failed to state a claim for relief based upon her constitutionally secured rights to procedural due process of law and her substantive familial rights that have long been considered the "basic civil rights of man." *Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942). "The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Skinner v. Oklahoma, supra,* at 541, and the Ninth Amendment, *Griswold v. Connecticut,* 381 U.S. 479, 496 (1965) (Goldberg, J., concurring)." *Stanley v. Illinois, supra,* 405 U.S. at 651.

Nothing we have said suggests that we have any opinion about the ultimate merits of Mrs. Morrison's action. Affirmed in part, reversed in part, and remanded to the district court for further proceedings consistent with the views herein expressed.

The parties shall bear their own costs on appeal.

United States District Court, Central District of California

WALTRUENT MARGARETE ROSA MORRISON,

Plaintiff,

v.

WILLIAM E. JONES, DONALD L. SCHROEDER, CLAYTON RECORD, A. A. McCANDLESS, A. NORTON YOUNGLOVE, BYRON C. MORTON, DISTRICT ATTORNEY FOR THE COUNTY OF RIVERSIDE, DONALD D. SULLIVAN, CLERK OF THE SUPERIOR COURT FOR THE COUNTY OF RIVERSIDE, EDWARD T. HIMENO, M.D.,

Defendants.

No. CV 75-2794-FW.

MEMORANDUM OF DECISION.

Filed: Sept. 30, 1976.

This is an action for alleged deprivation of Plaintiff's civil rights pursuant to 42 U.S.C. §1983. In substance, Plaintiff by her first amended complaint claims that her son was wrongfully sent by the County of Riverside for placement with his grandparents. She contends that Defendants acted in spite of a stay order issued by the Riverside County Superior Court.

A detailed examination of the record discloses that the Judge of the Superior Court on May 5, 1975, did in fact order that placement in Germany with the grandparents was an alternative to keeping the child institu-

tionalized in Riverside County.

Further, it does not appear from the record that Plaintiff appealed from the Superior Court's original order of December 27, 1974, which first indicated placement in Germany as an alternative for the child. In any event, there was no order of court staying the effect of the aforementioned order of May 5, 1975, providing placement in Germany as an alternative.

In November 1972 Plaintiff voluntarily surrendered her child, now age fourteen, to the care of the Children's Psychiatric Unit of the Riverside County General Hospital. The child was thereafter declared a ward of the Juvenile Court under California Welfare and Institutions Code §600(a). His status as a ward of the court was continued at annual review hearings.

At the December 27, 1974 annual review hearing the Juvenile Court ordered the child to be placed in a "suitable facility." One alternative mentioned in the Court's order was placement in the home of the child's grandparents in Germany.

A request for travel and travel funds was made by the Department of Public Social Services for the County of Riverside. On March 25, 1975, the Riverside County Board of Supervisors (the Board) approved the travel request. Funds for such travel were approved by the Board on April 1, 1975.

On May 5, 1975, the Juvenile Court affirmed its order of December 27, 1974. Pursuant thereto, the child was placed with his grandparents in Germany.

Defendants' respective motions to dismiss for failure to state a claim upon which relief can be granted came on for hearing; the Court stated such motions would be considered as motions for summary judgment;

they thereafter were submitted for decision. Defendants accompanied their motions with affidavits which have been considered by the Court. It is the opinion of the Court that Defendants' motions should be granted for the reasons set forth herein.

Defendants Jones, Schroeder, Record, McCandless and Younglove are members of the Riverside County Board of Supervisors. By affidavit they assert all acts performed by them were within the scope of their public office. State government officials are immune from liability under the Civil Rights Act for discretionary acts done within the scope of their authority. *Hoffman v. Haldin*, 268 F.2d 280 (9th Cir. 1959). Further, California Government Code §820.2 confers immunity upon public officials for discretionary acts. These Defendants are therefore entitled to summary judgment.

Defendant Byron C. Morrison, District Attorney for the County of Riverside, asserts by affidavit that at all times he was acting within the scope of the authority of his office. In *Imbler v. Pachtman*, 424 U.S. 409 (1976), the United States Supreme Court held that public prosecutors are immune from damage suits based on acts performed within the scope of their office. Defendant Morton is therefore entitled to summary judgment.

Defendant Donald D. Sullivan, Clerk of the Superior Court of the County of Riverside, states by affidavit that at all relevant times he was acting within the scope of his duties. Court clerks serve a quasi-judicial function and so are entitled to immunity from suit based on acts performed in implementing orders and decisions of the courts. *Stewart v. Minnick*, 409 F.2d 826 (9th Cir. 1969). Defendant Sullivan is therefore entitled to summary judgment.

Defendant Edward T. Himeno, M.D., is Director of Child Psychiatry of the In-Patient Unit at Riverside County General Hospital. He asserts that his diagnosis of Plaintiff's son was performed within the scope of his duties as Director. Public employees are not exonerated from liability for injury proximately caused by their negligent acts or omissions, California Government Code §854.8(d). However, Plaintiff fails to allege facts which would support a finding that Defendant's diagnosis was conducted negligently or in any way caused Plaintiff's injury. Defendant Himeno is therefore entitled to summary judgment.

Defendant Department of Social Services for the County of Riverside is a public entity as defined by California Government Code §811.2. Public entities are immune from liability for injuries. California Government Code §815(a). Such Defendant is therefore entitled to summary judgment.

Defendant Paul R. Wiley, Director of the Department of Public Social Services, asserts by affidavit that at all relevant times he was acting within the scope of his office. It is the opinion of the Court that he shares the immunity of the public entity which he serves. Defendant Wiley is therefore entitled to summary judgment.

It should be noted that there is nothing in the record that indicates that any Defendant acted with malice, express or implied.

The foregoing is a summary of the undisputed material facts and conclusions of law of the Court. Judgment shall be entered accordingly for Defendants, but no judgment shall be entered until a formal judgment has been signed and filed by the Court.

DATED this 29th day of September, 1976.

FRANCIS C. WHELAN
UNITED STATES DISTRICT JUDGE